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UNITED STATES DISTRICT COURT

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DISTRICT OF MASSACHUSETTS

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THE UNITED STATES OF AMERICA : Civil Action:
: No. 02-12490-REK and
V. : No. 04-12344-REK
: 1 Courthouse Way
ROBERT HAAG and KATHLEEN HAAG : 11:00 a.m., Thursday
: December 15, 2005

6

ROBERT HAAG and KATHLEEN HAAG :

7

V. :

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INTERNAL REVENUE SERVICE :

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Before: THE HONORABLE ROBERT E. KEETON

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UNITED STATES SENIOR DISTRICT JUDGE

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15 APPEARANCES:

16

Stephen J. Turanchik, Esquire,
U.S. Department of Justice, P. O. Box 55,
Ben Franklin Station, Washington, DC 20044
on behalf of the Government.

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Burke & Associates, (by Timothy J. Burke, Esquire),
400 Washington Street - Suite 303, Braintree, MA 02184,
on behalf of Robert Haag and Kathleen Haag.

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Marie L. Cloonan
Federal Court Reporter

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1 Courthouse Way - Room 7200
Boston, MA 02210- 617-439-7086

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1 THE CLERK: Civil Action Nos. 02-12490-REK and
2 04-12344-REK United States v. Robert Haag and Kathleen
3 Haag, and Robert Haag and Kathleen Haag v. The Internal
4 Revenue Service of the United States.

5 Will the attorneys please stand and state their
6 names.

7 MR. TURANCHIK: Good morning, your Honor, Steve
8 Turanchik on behalf of the United States.

9 MR. BURKE: Good morning, your Honor Tim Burke on
10 behalf of the Haags.

11 THE COURT: Are you ready for a hearing on the
12 pending motions?

13 MR. TURANCHIK: Yes, your Honor.

14 MR. BURKE: Yes, your Honor.

15 THE COURT: All right, Ill hear you.

16 MR. TURANCHIK: Your Honor, the United States has
17 filed both a Motion for Summary Judgment and a motion to.
18 Dismiss certain counts in the Haags' complaint that is
19 moot. I think it's going to be easier for me to present
20 these first as the Motion for Summary Judgment and then as
21 the Motion to Dismiss.

22 The first case that was filed is United States v.
23 Haag, and that's 02-12490 case. In that case The United
24 States is seeking a money judgment against Robert and
25 Kathleen Haag for unpaid taxes for 1985 through '91, and

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1 the year 1993. In the Motion for Summary Judgment the
2 United States has set forth sufficient allegations that an
3 assessment was made, notice was given to the Haags and a
4 balance of about \$1.8 million remains unpaid. The Haags'
5 opposition through statement of facts or statement of
6 uncontested facts, Paragraphs 1 through 12, the Haags do
7 not contest. There doesn't seem to be any argument that
8 the Haags are liable for over \$1.8 million dollars as of
9 October 31st of this year.

10 I believe the Haags' only argument has already
11 been resolved by this Court. That was earlier in this case
12 Kathleen Haag had raised the innocent spouse defense. Your
13 Honor in an earlier decision found that that defense was
14 out of time, that it was time barred, that she should have
15 raised it before and by the time it came into this
16 proceeding it was too late. So with regard to the United
17 States' Motion for Summary Judgment in the 2002 case, there
18 doesn't seem to be any dispute that the Haags are liable
19 for \$1.8 million.

20 The United States has also filed for summary
21 judgment with regard to the 2004 case. In that case the
22 Haags are seeking a variety of relief all relating to the
23 perceived failure by the Internal Revenue Service to
24 provide the Haags with notice of a Collection Due Process
25 hearing. When, actually, during the 2002 case the IRS

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1 filed, we filed a notice of Federal tax lien in November of
2 2003. At that time the IRS should have issued the Haags a
3 Collection Due Process notice.

4 Originally the United States couldn't find any
5 record that a Collection Due Process Notice had been issued
6 and that would provide the Haags with a CDP, a Collection
7 Due Process, hearing in front of the IRS. When I had
8 obtained the case, which was the last couple of months,
9 your Honor, as I was preparing for summary judgment, I was
10 looking through my file and I happened to see two letters,
11 one to Kathleen Haag and one to Robert Haag. They are
12 attached as Government Exhibit 14, which are Collection Due
13 Process notices, they are dated November 21st, 2003. Both
14 letters are virtually the same but for the names that
15 appear on them.

16 They tell the Haags: This letter is to inform you
17 that we have filed a notice of federal tax lien and this
18 letter will also explain your right to appeal the
19 collection action and how you can get a release of the
20 federal tax lien. Further, it says, you have the right to
21 a hearing. You have a right to request a hearing with us
22 to explain this collection action and to discuss your
23 payment method options. To explain different collection
24 appeal procedures available to you we have enclosed
25 publication No. 1660 Collection Appeal Rights. These

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1 letters are the Collection Due Process notices. I, as the
2 attorney for the government, noticed that there was also
3 certified mail in our administrative files. We asked the
4 IRS to see if they could find us in their computer files
5 and they have been able to do so.

6 It seems the Haags only defense to this is we
7 don't know what was said. Yeah, that's my signature, but I
8 don't know what was said. That is insufficient to defeat a
9 Motion for Summary Judgment. Conclusory allegations,
10 speculations, are insufficient to defeat a Motion for
11 Summary Judgment. The defendant of a nonmovant must come
12 forward with specific facts to defeat a Motion for Summary
13 Judgment. They haven't done so in this case.

14 To the extent there's any prejudice here, that
15 prejudice has inured to the Haags' benefit. They were
16 entitled to a hearing and they may receive one. That
17 hearing is still pending, your Honor. But the meat of the
18 complaint --

19 THE COURT: They had a hearing?

20 MR. TURANCHIK: Yes, the hearing has in fact been
21 held and that is the basis for the United States' Motion to
22 Dismiss for motness. In the Haags --

23 THE COURT: How do I know the hearing was held? I
24 understand your argument that the notice was given, but how
25 do I know whether the hearing was held?

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1 MR. TURANCHIK: Your Honor, I don't know if I've
2 submitted any evidence by affidavit in that, but I don't
3 believe there's any dispute as to that in this case.

4 MR. BURKE: If I could jump in for one second. I
5 don't mean to steal Mr. Turanchik's thunder. The hearing
6 is ongoing. In answer to just help the Court, the hearing
7 as it exists now is ongoing.

8 MR. TURANCHIK: A CDP hearing was held, your
9 Honor, on August 3rd, 2005. The Haags came into the IRS on
10 August 3rd. After that meeting, on August 15th the Haags
11 requested a further meeting, that being a manager's
12 conference, with the IRS. That manager's conference was
13 held on September 7th, 2005. That still remains opened.
14 But there has not been a resolution to that manager's
15 conference arising in the Collection Due Process hearing.
16 But I should say in the ordinary course of the Collection
17 Due Process hearing if a taxpayer is unhappy with the IRS's
18 determination from that CDP hearing, with regard to income
19 taxes the proper place to appeal that determination is the
20 Tax Court, it's not the U.S. District Court. So, if they
21 are unhappy as to what happened at the hearing, they have
22 an appeal on it. It's to the Tax Court.

23 When this gets appealed to the District Court it's
24 on Collection Due Process hearings, or things like
25 withholding taxes or excise taxes. But with relation to

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1 income taxes, if the taxpayers aren't happy with what
2 happens at that CDP hearing, that goes to the Tax Court.

3 That's the basis of the United States' motion to
4 dismiss for mootness.

5 The Haags have come in at Counts 1, 3, and 4 of
6 their amended complaint and asked this Court to determine:
7 One, that they are entitled to a hearing; Two, that you
8 issue an injunction ordering the United States to hold a
9 hearing and then issue an order compelling the IRS to hold
10 that hearing. There is no need for that, there's no need
11 for those orders because the hearing has been held.

12 Even before we get to the Motion to Dismiss for
13 Mootness, I don't believe the Court needs to rule on the
14 Motion to Dismiss for Mootness, because the complaint which
15 the Haags seek, which is they never received a Collection
16 Due Process notice in November of 2003, it doesn't stand up
17 to the evidence. The facts presented in this court show
18 the Haags did receive a Collection Due Process notice. But
19 that was then.

20 By the time we get to 2005, they weren't even
21 entitled to one. The IRS gave them one but they weren't
22 entitled to one. The courts would not order something for
23 the Haags that they were not entitled to. So, your Honor,
24 I would ask you to first grant the United States' motion in
25 regard to the dollar amount of the Haags' tax liability,

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1 but also certiorari judgment that the facts underlying the
2 Haags' complaint aren't borne out by the evidence adduced
3 and presented to this court by the United States. Thank
4 you, your Honor.

5 MR. BURKE: At the outset, your Honor, where we
6 stand with the first question of summary judgment in the
7 amount of money, there is no dispute as to the amount of
8 money. We did not dispute that in the ongoing CDP hearing
9 and there is no intention to dispute the amount of money
10 that the government alleges as being owed. There is a
11 tremendous dispute of facts relative to this CDP notice.

12 What has happened in this Court is that I think
13 maybe a year or two years ago -- time matches on -- the
14 Court ruled against Mrs. Haag's claim to be an innocent
15 spouse. As far as that process, it was discovered that the
16 United States government had not granted her Collection Due
17 Process rights. We filed a complaint. The government
18 answered the complaint saying they did not provide her with
19 a notice. Attached to both Mrs. Haag's -- to the
20 government's, opposition to Mrs. Haags's request for
21 summary judgment as well as, I believe to Exhibits 5
22 through 12 of the government's motion here. There is
23 another record of the Service's accounting. There is a
24 record in here of Collection Due Process notices. There is
25 not a single reflection of that notice. So what we have

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1 here is the government -- a new attorney on the case coming
2 forward and saying, "I have newly discovered evidence."
3 It's inconsistent with their own evidence which they filed
4 under the pains and penalties of this court. It's
5 inconsistent, it's not in their records. It's also
6 inconsistent with their answers to the complaint.

7 THE COURT: Now, it appears of record that their
8 earlier position was mistaken, then the fact that the two
9 are inconsistent is obvious but the inconsistency doesn't
10 mean that the Court is not authorized to accept and find
11 that the earlier position was incorrect and they had a
12 obligation to the Court to correct it.

13 MR. BURKE: Thank you, your Honor, I appreciate
14 that. Because what we have here is a record, an Internal
15 Revenue Service record which is inconsistent with the
16 position being maintained today. This is before the Court.
17 This document -- There are transcripts in the record, on
18 both cases, even though it's consolidated as a single case,
19 which belies the position that he has taken.

20 THE COURT: Well, in what respect?

21 MR. BURKE: In these records, these are
22 transcripts of the account. They include -- indeed, you
23 can correct me if I am wrong -- they include a listing of
24 notices that go to the taxpayers. In these records there
25 is a reflection of a prior notice, which extraditioned in

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1 1999 to the taxpayers. There is no record of any notice
2 being issued at the time he says one was issued.

3 THE COURT: Now, what time are you talking about
4 now?

5 MR. BURKE: I don't have it before -- wait a
6 second. Your Honor, he, Mr. Turanchick, is maintaining
7 that a notice went, out on 11-21 of 2003. If the Court has
8 the opportunity to look at this, there are pages and
9 pages. There's no reflection in the Service's own records
10 of a notice being sent out on 11-21 2003. So what you have
11 is you have the same party to a law suit coming in with
12 inconsistent computer records. There is no affidavit
13 before the Court where one person says: I'm the person who
14 generated the numbers; I'm the person who put the notice
15 into the envelope; I'm the person who effectuated the
16 supply of mail. There is nothing in the record that
17 indicates that.

18 The position of the Haags, your Honor, is there's
19 a very good reason for that because it probably didn't
20 happen. It may have happened. There's a possibility it
21 may have happened. They may be telling the truth. They
22 may have made a great error here, but we don't know that.
23 There is an inconsistency here, there is a fact in
24 dispute. The fact in dispute here is generated not through
25 some self-serving --

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1 THE COURT: What evidence are you going to have on
2 that fact in dispute?

3 MR. BURKE: What we're going to have to do your
4 Honor -- this is not appropriate for summary judgment.
5 What we're going to have to do is request the Court to
6 allow us to depose these people. Who did this? This is
7 new evidence. This is late in the case evidence. What has
8 happened here, and I don't want to digress from my point,
9 but what has happened here is we filed a complaint. The
10 Service agreed we were right. They issued a subsequent
11 notice, they issued another notice on April 13th of this
12 year. So they issue another notice. They're saying it's
13 another notice. We're saying it's the first notice. After
14 that notice, an appropriate appeal was filed. And the
15 hearing as of this date is ongoing. As a matter of fact
16 part of the hearing --

17 THE COURT: Now, what happens when that hearing is
18 completed?

19 MR. BURKE: What happens there is the hearing it
20 has a couple of components. One is you meet with the
21 Internal Revenue Service and in this case an offer of
22 compromise will be filed, which is part of the Collection
23 Due Process.

24 THE COURT: Will be but has not been?

25 MR. BURKE: It is in discussion, your Honor. What

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1 has happened here -- I don't want to jump around but I will
2 discuss the mootness issue. When a notice was first filed
3 there was a dispute which was resolved as to whether or not
4 the hearing could be held within the Internal Revenue
5 Service. That was resolved favorably for the taxpayer.
6 Then, when the hearing was held, we requested it be held
7 pursuant to the statute, a request for innocent spouse
8 relief for Mrs. Haag. That issue is still open. What has
9 also happened by agreement -- it's not in the record but I
10 happen to know --

11 THE COURT: Isn't that an issue I ruled on?

12 MR. BURKE: No. But there is a separate action.
13 Your ruling -- there's three ways to get innocent spouse
14 relief under the Internal Revenue code:

15 One is an affirmative defense in front of the
16 United States Tax Court;

17 One is a stand-alone petition under the Internal
18 Revenue Code 6050;

19 And the third is under Section 6320 and 6330,
20 which is Collection Due Process rights.

21 The key issue here with the Collection Due Process
22 rights are that it is the Haags' position that that section
23 revives their right to file. The Court has ruled that they
24 don't have the right to file the innocent spouse request.
25 That section more than arguably revives their right to file

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1 an innocent spouse request. So that request can be filed
2 with a CDP hearing. That's a legal issue that frankly
3 would not be resolved by this Court. It would likely be
4 resolved by the United States Tax Court if we don't come to
5 a conclusion through the CDP hearing. I apologize to the
6 Court --

7 THE COURT: Well if that's the case, why shouldn't
8 I get rid of the cases here because it would not be my
9 jurisdiction to resolve the dispute that remains, it will
10 be the Tax Court.

11 MR. BURKE: No, that is not entirely true. What
12 would happen here is that what the government would argue
13 -- and this relates to the mootness issue also. There are
14 two arguments here, one being summary judgment and one
15 being mootness. If the Court has the opportunity and you
16 read the procedural history of the case as presented in our
17 papers, the government has put in every possible impediment
18 that they can for the Haags to have a fair administrative
19 hearing. Should the Court rule that -- if summary judgment
20 should issue here, the government will simply come in and
21 argue that they weren't entitled to a CDP hearing. We made
22 another mistake. Sorry, you lose your rights, you lose
23 your chance to go to the tax court, you lose your chance to
24 get innocent spouse relief from the United States Tax
25 Court. So that is what's happened here.

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1 But it's not a moot issue at this point. What
2 would happen ultimately, the way the procedures work, is
3 that at some point the Department of Justice, the way the
4 statute works, the Department of Justice, this gentleman,
5 actually, has to decide what is the fair offer of
6 compromise in this case.

7 If we disagreed, if counsel disagrees and the
8 Haags and the United States disagrees as to what a fair
9 amount is, that issue actually goes back to the IRS, in
10 front of the IRS, if they agree with the Department of
11 Justice, that issue would go to the United States Tax
12 Court.

13 But the pivotal factor in this case and the only issue
14 I believe before the Court, as I see it, is that we filed a
15 complaint. The government did as it should have done under
16 the statute, it granted them a hearing. It now comes in --
17 it claims evidence, evidence that doesn't meet any kind of
18 standard as being beyond the material dispute, because it
19 isn't supported by personal knowledge of anybody who
20 allegedly mailed these letters, so it doesn't make the
21 requirement of being a fact in disput. Again, his entire
22 case turns on this evidence which he alleges he discovered
23 in a file.

24 THE COURT: How do you propose we should proceed
25 at this point?

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1 MR. BURKE: What I suggest to the Court is if the
2 government wishes to aggressively maintain that it has made
3 a series of errors and then it made an error in granting
4 these parties a CDP hearing, then we're going to have to
5 take depositions of all the parties involved in the notice.
6 If --

7 THE COURT: Now, you're putting an "if" there.

8 MR. BURKE: What would I like you to do?

9 THE COURT: What do you propose I do right now?

10 MR. BURKE: I don't know.

11 THE COURT: No if's or and's or buts. What do you
12 propose I do right now?

13 MR. BURKE: I respectfully request, your Honor,
14 due to the dispute over the facts of this mailing, that the
15 Court deny the Motion for Summary Judgment as to the issue
16 --

17 THE COURT: I may just not rule on it.

18 MR. BURKE: Okay.

19 THE COURT: What do you propose I do right now,
20 what order?

21 MR. BURKE: Oh, I would request the Court does not
22 rule on the Motion for Summary Judgment. That I be granted
23 60 days to do some additional discovery in this case.

24 THE COURT: What discovery do you want to do that
25 could possibly make a difference in the case?

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1 MR. BURKE: The specific discovery I would like to
2 do is to do discovery to ascertain the exact history --

3 THE COURT: What discovery?

4 MR. BURKE: Presumably depositions of the United
5 States government and it's employees who in any way know
6 anything about this newly discovered evidence. I don't
7 want any other discovery, just this document dated --

8 THE COURT: All right, all right.

9 MR. BURKE: -- November 21, 2003.

10 THE COURT: All right. When do you want, to do
11 whatever you want to do? You say you want to take a
12 deposition. Whose deposition?

13 MR. BURKE: What I said, being in the nature of a
14 30(b)(6) deposition.

15 THE COURT: All right. When, what date?

16 MR. BURKE: Within the next 60 days.

17 THE COURT: What date do you propose? I want to
18 set the date right now.

19 MR. BURKE: If I could have one second, your
20 Honor, to grab my phone which has my schedule.

21 THE COURT: All right.

22 MR. BURKE: January 10th?

23 MR. TURANCHIK: That's fine.

24 MR. BURKE: January 10th your Honor?

25 MR. TURANCHIK: Your Honor, the difficulty with a

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1 30(b)(6) deposition is that invariably evidence that
2 Mr. Burke is seeking has been discovered by me, government
3 counsel, and I don't think he can take the deposition of
4 government counsel. I may --

5 THE COURT: Now, now, now, then you will have to
6 step out of the case and let somebody else step in and
7 assess this situation.

8 MR. TURANCHIK: Fair enough, your Honor.

9 THE COURT: You can't escape having the
10 deposition. He has a right to the deposition by saying --

11 MR. TURANCHIK: I will be happy to, your Honor.

12 I will mention this Monday, this past Monday I
13 filed a supplement to United States Motion for Summary
14 Judgment, which was a declaration from the Internal Revenue
15 Supervisor Rae Shepardson. She is located up in Vermont
16 but she is assigned the Haags' case. She has testified as
17 to having knowledge of the IRS computer system. That on
18 the computer system she accessed these letters that were
19 sent out and was able to print them out.

20 MR. BURKE: Your Honor --

21 MR. TURANCHIK: Your Honor, that would be
22 sufficient if at trial a question came into admissibility
23 of these two documents. I have already submitted, I
24 believe, the required affidavit to get these documents into
25 evidence.

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1 MR. BURKE: Your Honor, I have to speak to this
2 affidavit. First of all, I got this affidavit this
3 morning. As I told the Court last week, I was in New York
4 for the last three days. This came on my desk this
5 morning. Under the local rules when you file anything with
6 the Court you are supposed to notify opposing counsel. He
7 hasn't done that. There's no motion to supplement as
8 alleged in the Motion for Summary Judgment, that isn't here
9 either. So what he did is he filed this thing which
10 doesn't specifically say that I know this letter went out,
11 if you get a chance to read it.

12 What he did is he filed this thing basically with
13 my office this morning because I didn't get it until this
14 morning, with information which still doesn't get him over
15 the requirement for a fact line dispute. This document
16 shouldn't be before the Court. In fact an appropriate
17 motion in limine will be filed tomorrow. This evidence
18 entirely discounts -- it doesn't comply with the local
19 rules, it doesn't comply with anybody.

20 THE COURT: That's simply a request for a delay.
21 I'm going to set the 30(b)(6) deposition.

22 MR. BURKE: Thank you, your Honor.

23 THE COURT: If you want this person to be present
24 for the 30(b)(6) deposition and somebody else as well, just
25 say so right now.

19

1 MR. BURKE: The people I want at the deposition,
2 your Honor, would be any person within the Internal Revenue
3 Service or the Department of Justice who has knowledge,

4 THE COURT: Identify any persons you think have
5 knowledge.

6 MR. BURKE: Well, the first person I think has
7 knowledge happens to be Mr. Turanchik, but the other --
8 this letter -- the perplexity with this -- This isn't
9 signed. There's no person on this alleged notice. There's
10 no name on it.

11 THE COURT: What notice are you holding up now?

12 MR. BURKE: The notice he says provides them basis
13 for having this case dismissed. There's no signature on
14 the letter.

15 THE COURT: Well, again, you may have to get
16 subpoenas but I'm authorizing you to take the depositions.

17 MR. BURKE: Okay. Can we bring in Rae Shepardson,
18 your Honor?

19 MR. TURANCHIK: The problem I have here is that
20 the two people involved in the case have retired. I can
21 certainly with the Court's approval bring them in. We have
22 one person who's issued the notice.

23 THE COURT: You may bring in whomever you wish --

24 MR. BURKE: Okay.

25 THE COURT: -- if you get the appropriate service

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1 of a subpoena to get the person to appear at whatever place
2 is appropriate service of the subpoena to get the person to
3 appear at whatever place is appropriate that I am
4 authorizing. That's so stipulated --

5 MR. TURANCHIK: Thank you, your Honor.

6 THE COURT: -- and I accept the stipulation and so
7 rule.

8 MR. TURANCHIK: Thank you, your Honor.

9 THE COURT: All right, anything else we can do
10 today?

11 MR. TURANCHIK: No, your honor. Thank you.

12 MR. BURKE: Thank you.

13 THE COURT: All right, we will be in recess.

14 (Whereupon the Hearing was concluded.)

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CERTIFICATE

I, Marie L. Cloonan, Official Reporter of the
United States District Court, do hereby certify that the
foregoing transcript, from Page 1 to Page 20, constitutes
to the best of my skill and ability a true and accurate
transcription of my stenotype notes taken in the matter of
Civil Action No. 02-12490-REK and No. 04-12344-REK, The
United States v. Robert Haag and Kathleen Haag and Robert
Haag and Kathleen Haag v. The Internal Revenue Service.

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